

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff

v.

DAVID BORUCHOWITZ

Defendant

Case No.: 2:23-cr-00149-APG-BNW

**Order Granting Defendant David  
Boruchowitz's Motion in Limine to  
Exclude Lewis Roca Internal Investigation  
Report and References to Report Findings  
in Other Evidence/Testimony**

[ECF No. 49]

Defendant David Boruchowitz moves in limine to exclude an internal investigation report commissioned by the Valley Electric Association, Inc. (VEA) and conducted by the law firm Lewis Roca Rothgerber Christie to determine whether Angela Evans violated internal VEA policies or state laws. He argues that the report, along with any mentions of its findings in other testimony and evidence, should be excluded as (1) irrelevant, (2) unfairly prejudicial, and (3) inadmissible hearsay. Although the Government has stated it will not seek to introduce the report into evidence, it is planning to introduce Evans's termination letter, which mentions the report's finding of no criminal wrongdoing by Evans. ECF Nos. 62 at 2; 49-3 at 2-3. Boruchowitz contends that the "only purpose for introducing the termination letter would be to find a 'back door'" to introduce the report because neither party disputes that Evans was terminated. ECF No. 49 at 4. Boruchowitz also asserts that references to the report's exoneration finding, including in Evans's termination letter, are irrelevant because any post-arrest findings on whether Evans violated state law or VEA policies have nothing to do with determining whether he had probable cause to arrest her or engaged in a scheme to defraud. He also argues that the

1 report will invite a mini trial on the document and that admitting references to the exoneration  
2 finding would be unfairly prejudicial because (1) it will “lend[] the imprimatur” of “respected”  
3 organizations and individuals (Lewis Roca; Josh Reid, the report’s author; the VEA), and (2) it  
4 will lead the jury to “conclude [Evans] did nothing wrong.” *Id.* at 5-6. Finally, he argues that  
5 Evans’s termination letter is inadmissible hearsay because it is offered for the truth of the matter  
6 asserted (that Evans did not commit a crime) and contains multiple layers of inadmissible  
7 hearsay.

8       The Government responds that Evans’s termination letter, including the references to the  
9 Lewis Roca report findings, is relevant to proving materiality in counts two through five because  
10 the letter helps to prove that Boruchowitz’s alleged scheme to defraud influenced the VEA’s  
11 decision to fire Evans, despite the results of the outside investigation. According to the  
12 Government, this relevance outweighs any potential unfair prejudice, which could be  
13 ameliorated by a limiting instruction. As for hearsay, the Government argues that it is not  
14 offering Evans’s termination letter and its references to the report findings for the truth of the  
15 matter asserted (that Evans was fired and was cleared of criminal wrongdoing), but rather to  
16 show that the arrest was material to the VEA’s decision to terminate her. Alternatively, it asserts  
17 that the state of mind exception applies, because the letter shows the author’s (VEA’s vice  
18 president on behalf of the VEA board) state of mind, in expressing his beliefs about and  
19 motivations for Evans’s termination. It also argues that the termination letter is a verbal act with  
20 independent legal significance.

21       At the December 12, 2024 hearing on this motion, the Government asserted that the  
22 evidence is also relevant to prove willfulness in count one because post-arrest acts could serve as  
23 after-the-fact, circumstantial evidence of intent. It also contended that the evidence provides

1 context for the alleged scheme and is thus relevant to show that Boruchowitz perjured himself as  
2 charged in count six. In response, Boruchowitz argued that the evidence is irrelevant to  
3 willfulness because the report and the termination letter are not Boruchowitz's subsequent acts  
4 and thus do not show his intent. Similarly, he argued that Lewis Roca's and the VEA's states of  
5 mind, evidenced in the report and the termination letter, are also irrelevant to the perjury charge.

6 Because I have dismissed counts two through five, and references to the report are not  
7 relevant to counts one and six, the evidence is irrelevant and its little—if any—probative value is  
8 substantially outweighed by its prejudicial effect. I therefore grant the motion and exclude the  
9 report, its findings, and any evidence or testimony relating to its findings.

#### 10 **I. FACTS**

11 Because the parties are familiar with the facts of the case, I recount only the details  
12 relevant to this motion. Sometime in 2019, the VEA commissioned Lewis Roca Rothgerber  
13 Christie to conduct an internal investigation about VEA projects completed on Evans's property,  
14 to determine whether Evans "violated VEA policies, bylaws, the terms and conditions of her  
15 employment with VEA or any state laws." ECF No. 49-2 at 2. Lewis Roca released its report  
16 about two months after Boruchowitz arrested Evans. As relevant here, the report found that  
17 (1) Evans violated VEA policy, (2) Evans "did not commit any illegal acts with respect to the  
18 Property," and (3) "the allegations made by the Nye County Sheriff's Office relating to Ms.  
19 Evans'[s] actions [were] unfounded." *Id.* at 2-3.

20 In June 2019, VEA terminated Evans from her at-will employment. ECF No. 49-1 at 2.  
21 Her termination letter made two references to the report's findings: (1) that "allegations that  
22 [Evans] violated VEA policies were founded," and (2) that "the allegations that [Evans] engaged  
23 in criminal conduct were unfounded." *Id.* at 2 & n.1. The termination letter stated that despite

1 the finding of no criminal wrongdoing, the continued public distrust of Evans following her  
2 arrest forced VEA to fire her. *Id.* at 2-3.

## 3 II. ANALYSIS

4 Under Federal Rule of Evidence 104(a), I decide the preliminary question of whether  
5 “evidence is admissible.” *United States v. Evans*, 728 F.3d 953, 960 (9th Cir. 2013) (quoting  
6 Fed. R. Evid. 104(a)). Under Rule 402, evidence must be relevant to be admissible, and under  
7 Rule 401, evidence is relevant if it has “any tendency” to make a material fact “more or less  
8 probable than it would be without the evidence.” Under Rule 403, I may exclude relevant  
9 evidence if “its probative value is substantially outweighed by a danger of . . . unfair prejudice,  
10 confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting  
11 cumulative evidence.” Unfair prejudice speaks to “an undue tendency to suggest decision on an  
12 improper basis.” Fed. R. Evid. 403, advisory committee notes to 1972 Proposed Rules. I may  
13 also exclude “cumulative evidence when it has little incremental value.” *United States v. Miguel*,  
14 87 F. App’x 67, 68 (9th Cir. 2004).

15 I granted Boruchowitz’s motion to dismiss counts two through five of the indictment.  
16 The remaining charges against Boruchowitz are count one, deprivation of rights under color of  
17 law, and count six, perjury. The Government’s primary argument for the relevance of the report  
18 findings and termination letter is that they help to establish the arrest was material to the VEA’s  
19 decision to fire Evans. But this argument applies only to the dismissed wire fraud charges.  
20 Materiality of the arrest is irrelevant to counts one and six. The post-arrest report’s finding that  
21 Evans did not engage in criminal wrongdoing and the termination letter do not help to prove or  
22 disprove whether Boruchowitz had probable cause to arrest Evans at the time of the arrest.  
23

1 As to the Government's argument that the evidence serves as circumstantial evidence of  
2 willfulness in count one, the Government is correct that it may prove intent by "acts that were  
3 subsequent to the actions at issue." *United States v. DiRoberto*, 686 F. App'x 458, 461 (9th Cir.  
4 2017); *see also Benchwick v. United States*, 297 F.2d 330, 336 (9th Cir. 1961) ("When the  
5 defendant's intent is at issue, a wide range of evidence as to [the defendant's] subsequent acts  
6 may well be relevant to the issue of prior intent, and hence be admissible . . . .[The defendant's  
7 actions] w[ere] relevant to a determination of the state of mind with which the defendant played  
8 his part in these events."). However, these documents and the statements within them are the  
9 subsequent acts and statements of Lewis Roca and the VEA, not Boruchowitz. Neither the  
10 report nor the letter speaks to Boruchowitz's actions or state of mind after the arrest. Thus, the  
11 Lewis Roca report, references to the report findings, and the termination letter are irrelevant to  
12 count one.

13 The Government argues that the evidence is relevant to count six because it provides  
14 context of the alleged scheme attached to the perjury charge. Count six alleges that Boruchowitz  
15 perjured himself during a civil lawsuit because he falsely denied (1) communicating with others  
16 about VEA Members for Change (VEAMC), (2) knowing about K.J.'s bias against Evans,  
17 (3) knowing that K.J. had demanded the VEA Board's resignation, and (4) that K.J. was the  
18 tipster for the search warrant. The Lewis Roca report and the VEA termination letter are not  
19 relevant to proving that Boruchowitz made the allegedly false statements about these matters.  
20 Even assuming that the report and the termination letter might provide context for the alleged  
21 scheme, the Government has not stated how this evidence would not duplicate other, more direct  
22 evidence of the alleged scheme and termination, such as testimony by VEA members. Nor does  
23 the Government address the potential danger of the jury improperly using references to the

1 report's exoneration findings in determining whether Boruchowitz had probable cause to arrest  
2 Evans. I recognize that exclusion of evidence under Rule 403 is "an extraordinary remedy to be  
3 used sparingly." *United States v. Reyes*, 660 F.3d 454, 464 (9th Cir. 2011) (quotation omitted).  
4 But as I noted above, the Government has other ways to introduce more direct contextual  
5 evidence of the alleged scheme without incurring the significant potential for unfair prejudice  
6 from the report's findings and the termination letter. And because other evidence will provide  
7 sufficient context of the alleged scheme, the termination letter has little incremental value. *See*  
8 *United States v. Jones*, 85 F. App'x 569, 570 (9th Cir. 2003) (affirming district court ruling that  
9 evidence was cumulative because there was "sufficient evidence . . . on the record" of what the  
10 excluded evidence sought to demonstrate). Thus, even if the report's findings and the letter are  
11 minimally relevant to count six, their probative value is substantially outweighed by the danger  
12 of needlessly presenting cumulative and unfairly prejudicial evidence.

13 I therefore grant the motion in limine and exclude Evans's termination letter and the  
14 Lewis Roca report, its findings, and any evidence or testimony relating to it. This includes  
15 references to those materials in testimony by Evans or any other witness.

### 16 III. CONCLUSION

17 I THEREFORE ORDER that defendant David Boruchowitz's motion to exclude the  
18 Lewis Roca report and its findings, including in Evans's termination letter and witness  
19 testimony, **(ECF No. 49) is GRANTED.**

20 DATED this 18th day of December, 2024.



22 ANDREW P. GORDON  
23 CHIEF UNITED STATES DISTRICT JUDGE